(3)

No. 86-1336

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1986

FRANK McCOY, EDWARD ERDELATZ and PIERRE MERLE,
Petitioners,

vs.

THE HEARST CORPORATION, A California Corporation,
SAN FRANCISCO EXAMINER, RAUL RAMIREZ
and LOWELL BERGMAN,
Respondents.

BRIEF IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Did the California Supreme Court correctly conclude that the evidence in this case was insufficient to show with convincing clarity that respondent reporters and newspaper acted with actual knowledge of falsity or a high degree of awareness of probable falsity?*

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* The San Francisco Examiner is wholly owned by The Hearst Corporation. The Hearst Corporation is part owner of the following affiliates: The San Francisco Newpaper Printing Company, Inc., and Hearst/ABC Video Enterprises Inc., a joint venture with ABC Video Enterprises, Inc. (a wholly owned subsidiary of Capital Cities/ABC, Inc.).

TABLE OF CONTENTS

TABLE OF AUTHORITIES CITED

Cases

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The fundamental premise underlying the petition—that the California Supreme Court held that an appellate court may "disregard reasonable findings and credibility determinations made by a jury" (Pet., p. i)—is wrong. The California court held no such thing. Rather, the court recognized that, pursuant to the constitutional principles set forth in *Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, an appellate court "must make an independent assessment of the entire record * * * only as it pertains to actual malice" (Appx., p. A4).[1] After an exhaustive review of the record (see Appx., pp. A10-A23, A28-A39), the California court concluded that petitioners had failed to

[1] The California court was careful to note that "[i]ssues apart from this constitutional question need not be reviewed de novo and are subject to the usual rules of appellate review" (Appx., p. A4).

meet their burden of providing clear and convincing proof of constitutional actual malice.

Even if, as petitioners assert, a "hot debate" exists as to the proper scope of appellate review (see Pet., p. 13), the opinion below does not present any issues in that debate. A unanimous California Supreme Court, properly applying this Court's opinion in *Bose,* carefully reviewed all of petitioners' evidence and correctly found it wanting.

STATEMENT OF THE CASE

Petitioners' statement of the case omits pertinent evidence and misstates much of the evidence that it does discuss. The evidence is reviewed in detail in the opinion of the California Supreme Court (Appx., pp. A10-A23, A28-A39),[2] and we therefore limit our discussion to some of the more important facts:

The parties: Respondents are the publishers and authors of three articles that appeared in The San Francisco Examiner in 1976. Those articles described the 1972 trial and conviction of Richard Lee in a San Francisco Chinatown murder case. They reported that a key prosecution witness in that trial—Lee's former cellmate, Thomas Porter—averred in an affidavit that petitioners had induced him to testify falsely that Lee had confessed the murder to him. Petitioners McCoy and Erdelatz were the police officers involved in the case, and petitioner Merle was the assistant district attorney who prosecuted it.

The investigation: Respondent Lowell Bergman, a freelance investigative journalist, was contacted by William Lee, Richard Lee's brother, who asked Bergman to investigate what William Lee believed to have been an unfair trial (Appx., p. A10; R.T. 2702-2705). Although initially reluctant to do so, Bergman reviewed the trial transcript and noted several apparent irregularities in the proceedings (Appx., pp. A10-A11; R.T. 2705-2711). Bergman also met with individuals who provided him with additional information which led him to believe that Richard Lee's

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[2] Petitioners do not and cannot contend that the California court's review of the evidence is inaccurate or incomplete.

trial may have been unfair (Appx., pp. A11-A13; R.T. 2713-2717, 2719-2726). Thereafter, Bergman wrote to Lee's former cellmate, Thomas Porter, and asked for an opportunity to interview him (Appx., p. A13; R.T. 2726-2728). Porter, who was then incarcerated in a federal institution in Indiana, responded by telephone call (Appx., p. A13; R.T. 1025-1027, 2728-2729).

Petitioners base their claim of actual malice on the assertion that Bergman solicited from Porter a false recantation of his Lee trial testimony (see Pet., pp. 4, 11). Porter, however, admitted that he *volunteered,* both during his telephone conversation with Bergman and at their subsequent meeting, that he had testified falsely against Richard Lee, that his testimony was induced by threats and promises made by petitioners, and that he was sorry for what he had done (Appx., pp. A13-A14, A15-A16, A28-A29; R.T. 1026-1027, 1028-1030, 1037, 1161, 1242-1243, 1284-1285).[3]

In addition to admitting that he told Bergman that he had lied at the Lee trial, Porter at one point stated that he told Bergman that his Lee trial testimony was true. Porter further testified that Bergman responded that "he didn't believe it" (R.T. 1378); Porter also testified that Bergman made no such statement at all (R.T. 1197). Contrary to petitioners' assertions (Pet., p. 4), *Porter never testified that Bergman asked him to change his Lee trial testimony* (Appx., p. A15).[4] Rather, because Porter wanted assistance with a perceived sentencing problem in California, he decided to "run a scam" and to tell Bergman what Porter believed

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[3] Porter was unavailable at the time at trial, and all his testimony was by deposition.

[4] There is no basis for petitioners' assertion that Bergman "prodded" Porter into giving "an affidavit that would 'help spring Richard Lee' " (Pet., p. 4). The language quoted by petitioners is *Porter's* own characterization of his affidavit (see R.T. 1378). Porter did not claim that Bergman used such language or that Bergman "prodded" the information which Porter willingly volunteered (see R.T. 1197, 1201-1202, 1203, 1242-1243).

Bergman "wanted" to hear (Appx., pp. A15, A29-A30; R.T. 1225, 1235-1236, 1238, 1239-1240, 1281).[5]

After Bergman's interview with Porter, William Lee arranged for an Indiana attorney to obtain an affidavit from Porter in which Porter detailed his claims (Appx., pp. A16-A17; R.T. 1420-1421, 1490, 1508-1509). Thereafter, William Lee and Bergman met with representatives of The San Francisco Examiner, who agreed to investigate the matter (Appx., p. A18; R.T. 2809-2811). Bergman and reporter Raul Ramirez conducted a one and one-half year investigation, interviewing some forty individuals, including attorneys, law enforcement officials, persons involved in Asian-American community affairs, and friends and associates of Richard Lee (Appx., pp. A18, A22, A36). During the course of the investigation, respondents uncovered evidence which, they believed, corroborated Porter's allegations of improper conduct by petitioners.

That evidence included the facts that: (1) petitioner Merle failed to reveal Porter's identity as a prosecution witness prior to trial, in spite of a pretrial discovery order requiring that the names and statements of all witnesses be revealed (Appx., pp. A18-A19; R.T. 2218-2220, 3716); (2) before sentencing, petitioners McCoy and Erdelatz questioned Richard Lee without notifying his attorney (Appx., p. A19; R.T. 2371-2372); (3) records showed that an arrangement had been made between petitioners and Porter after he testified at the Lee trial (Appx., pp. A19-A20; R.T. 2798-2800; and see p. 4, fn. 5); (4) charges of improper conduct had been made against petitioner Merle in other cases (Appx., p. A20; R.T. 2083-2084, 2164, 2275-2276, 2719-2720); (5) Porter advised Bergman that he had overheard Merle applying pressure to

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[5] Porter was under a "detainer" requiring him to return to California to serve additional time after completion of his federal sentence (Appx., p. A13). Porter told Bergman that there had been an agreement with petitioners McCoy and Erdelatz that he would not have to return to California (Appx., p. A13; R.T. 972). Bergman inquired about the detainer and discovered that, in fact, there was a recommendation in Porter's file to that effect (Appx., pp. A13, A19-A20; R.T. 2799-2800; Def.Exh. E-1). The California authorities later released the detainer (Appx., p. A18; R.T. 1303-1304).

obtain testimony in another case, and respondents found a letter from Merle substantiating that claim (Appx., pp. A20-A21; R.T. 1667, 2579-2581, 2729-2730, 3670-3673); and (6) petitioners had pressured the sole eyewitness at Richard Lee's trial to testify in spite of her expressions of substantial uncertainty about her identification of Lee (Appx., p. A21; R.T. 1801-1802, 1921-1922, 2161-2162, 2253-2254).[6]

After completing their investigation, respondents published the articles in question. Shortly thereafter, a petition for habeas corpus was filed on behalf of Richard Lee, supported by Porter's affidavit and declarations from the two eyewitnesses to the killing (Appx., pp. A2, A34; R.T. 4049; C.T. 104-115). In response, the California Attorney General's office interviewed Porter, who then signed a second affidavit, this time averring that his Lee trial testimony in fact was true and that his first affidavit was false (Appx., p. A2; R.T. 997-998, 1290, 3754-3755, 3795). He explained that he had signed the first affidavit because he was angry about the then-unresolved sentencing problem (Appx., p. A2; R.T. 998).

The opinion below: Contrary to petitioners' assertions, the California Supreme Court did not hold that "respondents could have believed the allegations in Porter's affidavit because the other evidence against Richard Lee was weak" (Pet., p. 8). Rather, the California court undertook a careful review of the entire record in order to determine whether petitioners had

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[6] Porter told Bergman that he had already related his story to three other individuals; respondents were unsuccessful in their efforts to locate those individuals (Appx., p. A22; R.T. 1678-1679, 2147). Because of the inaccuracy of jail records, respondents were also unable to confirm the number of meetings that Porter had with petitioners (Appx., pp. A21, A35; R.T. 1702-1703, 2151). Neither fact impeached Porter's claims (Appx., pp. A21, A35; R.T. 1703).

Petitioners erroneously assert that the jail records established "only" three such meetings and that a Lieutenant Huegle testified that the records were accurate (Pet., p. 7). In fact, it is undisputed that the Undersheriff, Jim Denman, testified that he had advised Ramirez that the records were "relatively poor" and that therefore Ramirez might not be able to find the information that he sought (R.T. 4392-4394).

established, by clear and convincing evidence, that respondents had knowledge of falsity or a high degree of awareness of probable falsity.

The court noted that, as petitioners acknowledge here (Pet., p. 11), petitioners' primary claim was that Bergman solicited a false story from Porter (Appx., pp. A27-A30). However, the sole support for that contention was Porter's ambiguous, uncertain and self-contradictory deposition testimony. The California court held that such testimony was not clear and convincing proof that Bergman solicited a lie, and that therefore it could not support an inference of constitutional actual malice (Appx., p. A29). The court also held that petitioners' claims of actual malice based on other evidence were equally flawed (Appx., pp. A31-A39).[7]

ARGUMENT

I

THE DECISION OF THE CALIFORNIA SUPREME COURT IS IN ACCORD WITH THIS COURT'S DECISIONS, AND NO CONFLICT IS PRESENTED WITH THE DECISION OF ANY OTHER COURT.

A. The California court correctly held that an inference of constitutional actual malice could not be drawn from the ambiguous deposition testimony of a single witness.

Petitioners' case hinges on their claim that "a false affidavit [was] solicited by one of the reporters—Bergman" (Pet., p. 11). Petitioners, however, fail to set forth the critical evidence on this point—all of which is found in the deposition testimony of Porter. In that testimony, Porter acknowledged that he *volunteered* to Bergman that his testimony at the Lee trial was false and that it was induced by petitioners (Appx., pp. A13-A14, A16, A28-A29; R.T. 1026-1027, 1028-1030, 1037, 1242-1243, 1284-1285). It is

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[7] Petitioners note, but do not argue, their claim with respect to respondents' reports of certain California State Bar proceedings relating to petitioner Merle (see Pet., pp. 3, 7). The California Supreme Court thoroughly analyzed, and correctly rejected, that claim (see Appx., pp. A23, A38-A39).

undisputed that Bergman never asked Porter to manufacture his claims and that Porter did not tell Bergman or anyone else (prior to publication of the articles here in issue) that the events recited in his affidavit were not true (R.T. 1161, 1201-1202, 1203).

Petitioners' *only* evidence of "solicitation" by Bergman was Porter's account that he told Bergman that his Lee trial testimony actually was true. At one point, Porter stated that Bergman had responded that "he didn't believe it" (R.T. 1378), but at another point Porter denied that Bergman had made any such statement at all (R.T. 1197). The California court carefully analyzed this evidence:

> "It is unclear from Porter's deposition testimony whether [Bergman's alleged] response—the lynchpin of respondents' argument—merely reflected Bergman's confusion over the discrepancy between Porter's posture on the telephone and his new position (i.e., he thought Porter had told him that the testimony was false); or reflected Bergman's statement of his own belief that Porter had lied.
>
> "In either case, respondents err in relying on this isolated piece of ambiguous evidence as sufficiently *clear and convincing* proof that Bergman knowingly solicited the intricate lie that Porter proceeded to tell and tell again. As the Supreme Court stated in *Bose Corp.* v. *Consumers Union of U.S., Inc.*, supra, ' "[a]nalysis of this kind may be adequate when the alleged libel purports to be an . . . account of events that speak for themselves," ' but is not appropriate where the event in issue ' "bristle[s] with ambiguities" ' " (Appx., p. A29) (emphasis by court).

The California court went on to note that Porter's testimony showed that he confirmed to Bergman, over and over again, that he had lied at the Lee trial and that Porter believed that "he had managed to 'run a scam' on * * * Bergman" (Appx., pp. A29-A30); this evidence is "a far cry from clear and convincing proof that [Bergman had requested] that Porter *lie*" (Appx., p. A30) (emphasis by court).

The California court's conclusion was manifestly correct. On two occasions, this Court has emphasized that, while a jury's

inference of actual malice may be permissible when drawn from a " 'direct account *of events that speak for themselves*,' " such an inference may not be drawn from "an event 'that bristled with ambiguities' " (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512-513, quoting *Time, Inc.* v. *Pape* (1971) 401 U.S. 279, 285, 290) (emphasis by Court). The California court properly applied the rule set forth in *Pape* and *Bose* to limit the inferences to be drawn from Porter's vague, ambiguous and self-contradictory deposition testimony. Contrary to petitioners' assertions (Pet., pp. i, 14), the California court did not suggest, let alone hold, that a jury's resolution of purely factual questions, i.e., "events that speak for themselves," should be disregarded by an appellate court. Nor did the court suggest that questions of credibility pertaining to actual malice determinations should be reweighed by an appellate court.

Hence, no conflict exists with the post-*Bose* decisions cited by petitioners (Pet., pp. 11, 13). Those decisions involved jury resolutions of factual conflicts concerning events that spoke for themselves. For example, in *Tosti* v. *Ayik* (Mass. 1985) 476 N.E.2d 928, there was a direct conflict in eyewitness testimony as to whether the plaintiff was present on certain occasions and whether he performed certain acts (476 N.E.2d 936). And in another decision cited by petitioners, the court noted that "the versions of *what occurred* are in direct conflict" (*Starkins* v. *Bateman* (Ariz.App. 1986) 724 P.2d 1206, 1211) (emphasis added).[8] There was no such direct conflict in the evidence in this case. Rather, the *only* evidence of alleged solicitation of a "lie" was the ambiguous and uncertain deposition testimony of a single witness. The California court correctly applied this Court's rulings

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[8] A similar direct factual conflict was involved in *Dombey* v. *Phoenix Newspapers, Inc.* (Ariz. 1986) 724 P.2d 562, 574-576 (conflict as to whether the defendants were aware that their report was false). The remaining case cited by petitioners on this point, *Gazette, Inc.* v. *Harris* (Va. 1985) 325 S.E.2d 713, contains only dictum (see 325 S.E.2d 727-728).

to that testimony, and no conflict with any other decision is present.[9]

B. Petitioners' remaining evidence does not support a finding of actual malice.

Petitioners' remaining evidence also falls short of clear and convincing evidence of actual malice. For example, petitioners rely on Bergman's trial testimony that "he believed that the articles did not hurt [petitioners]," contending that the jury could have concluded that such "extraordinary" testimony undermined his credibility (Pet., p. 12). However, as this Court has pointed out, even if the trier of fact rejects testimony about events which occurred *after* publication, such discredited testimony "does not establish that [the writer] realized the inaccuracy at the time of publication"; it therefore "does not constitute clear and convincing evidence of actual malice" (*Bose Corp.* v. *Consumers Union of U.S., Inc.* (1984) 466 U.S. 485, 512; accord: *Anderson* v. *Liberty Lobby, Inc.* (1986) ____ U.S. ____, 106 S.Ct. 2505, 2514).[10] In a similar vein, petitioners note that Porter sent a Christmas "greeting" to petitioners, "the tone of which belied any prospect that the petitioners had forced him to commit perjury"

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[9] The pre-*Bose* decisions in *Alioto* v. *Cowles Communications, Inc.* (9 Cir. 1975) 519 F.2d 777 and *Guam Federation of Teachers, Local 1581, A.F.T.* v. *Ysrael* (9 Cir. 1974) 492 F.2d 438 (Pet., p. 10) discuss only general rules of appellate review under the *New York Times* rule. Neither analyzed the inferences that may be drawn from ambiguous evidence to support a finding of actual malice—the issue involved in *Pape, Bose* and the instant case.

[10] Petitioners also point to letters written by Bergman to Porter (Pet., p. 12). In the second letter, Bergman made clear that "I'm trying to set the record straight and that is my motivation" (Appx., p. A17; Pl.Exh. 28). No inference of actual malice can be drawn from these letters.

(Pet., p. 3). Petitioners again ignore a critical fact: there is no evidence that respondents were aware of this "greeting".[11]

Petitioners also make much of a supposed failure to corroborate Porter's charges (see Pet., pp. 6-7, 12). Petitioners insinuate that there must be "corroboration" by testimony of a participant in, or a witness to, the events in question. Because petitioners and Porter were the *only* witnesses to the events between themselves and because petitioners declined to speak to the reporters, it was impossible to obtain such direct corroborative evidence here:

> "Where a passage is incapable of independent verification, and where there are no convincing indicia of unreliability, publication of the passage cannot constitute reckless disregard for truth" (*Hotchner* v. *Castillo-Puche* (2 Cir. 1977) 551 F.2d 910, 914).

Moreover, petitioners ignore the substantial corroboration that was discovered by respondents. For example, the sole eyewitness at the Lee trial was uncertain in her testimony, and she advised respondent Ramirez that she was "never sure" about her identification of Richard Lee (Appx., p. A21; R.T. 1801-1802, 2161). She told respondents, and others who related her information to respondents, that petitioners had become angry with her when she expressed her uncertainty and that they had assured her there were several other eyewitnesses who had seen Richard Lee commit the crime (Appx., p. A21; R.T. 1801-1802, 1918-1933, 2158-2162, 2253-2254). Hence, respondents had direct evidence that petitioners had applied pressure to a key witness to assure her testimony against Lee. Petitioners do not, and cannot, deny this. Other evidence corroborating Porter's general allegations of im-

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[11] The purpose of Porter's communication (not mentioned by petitioners) was to solicit their favorable comment at an upcoming parole board hearing (R.T. 3181-3182).

proper conduct is discussed above (pp. 4-5), and in the opinion below (see Appx., pp. A18-A21).[12]

II

THE CALIFORNIA SUPREME COURT'S DECISION IS CONSISTENT WITH THIS COURT'S OPINION IN *ANDERSON v. LIBERTY LOBBY.*

Petitioners' assertion (Pet., pp. 13-14) that a conflict exists between the decision of the California court and the decision in *Anderson* v. *Liberty Lobby, Inc.* (1986) ____U.S. ____, 106 S.Ct. 2505 is based upon the same misconceptions discussed above. The California Supreme Court said nothing about reweighing the evidence or disregarding a fact-finder's resolution of purely factual questions. Rather, that court simply applied *Bose* and other pertinent cases to inferences drawn from ambiguous deposition testimony and to post-publication events that could not shed any light on respondents' knowledge at the time of publication. The California court did so correctly; no error occurred, and no issue is presented for review.

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[12] Petitioners do not even attempt to address the California court's review of the evidence or the court's conclusion, based on its evidentiary review, that the jury could not reasonably have determined that actual malice existed. Instead, petitioners seize upon a single sentence in the lengthy opinion below (see Pet., pp. 8-9, 11) to the effect that a court "is not bound to consider the evidence of actual malice in the light most favorable to [plaintiffs] or to draw all permissible inferences in favor of [plaintiffs]" (Appx., p. A9).

This isolated and ambiguous dictum appears only in the California court's preliminary discussion of general principles, and the court did not even mention, let alone apply, the point in its review of the evidence (see Appx., pp. A28-A39). When it analyzed the evidence, the California court did not disregard the jury's resolution of purely factual questions, nor did it draw any inferences of its own; rather, it simply rejected a constitutionally impermissible inference (supra, pp. 6-8) and held that a credibility determination about an event after publication was irrelevant (supra, p. 9).

CONCLUSION

For the foregoing reasons, the petition for a writ of certiorari should be denied.

Dated: San Francisco, California, April 13, 1987.

Respectfully submitted,

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